No. 23-6365

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

RODNEY ADAM HURDSMAN,

Petitioner,

-versus-

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Rodney A. Hurdsman #02170782
TDCJ-CID, Robertson Unit
12071 Farm to Market Road 3522
Abilene, Texas 79601

QUESTIONS PRESENTED

I. Whether the pretrial period between the time the Sixth Amendment right to counsel attaches to the start of trial is a critical stage of the proceedings, thus warranting a presumption of prejudice to the accused, when they are incarcerated and left without an attorney in the case for almost three full years during that pretrial period after being arrested pursuant to a warrant in the case.

II. Whether a plea bargain offer negotiated with the State is a critical stage of the proceedings, thus warranting a presumption of prejudice to the accused, when an attorney withdraws from a case without notice and leaves a plea offer accepted by the defendant unresolved and leaves the defendant without another attorney in the case for almost three full years thereafter.

III. Whether a defendant's failure to assert their Sixth Amendment right to a speedy trial and the three and a half year delay before the start of trial should rightfully be attributed and weighed against them in the speedy trial analysis when they are incarcerated and unrepresented by an attorney during that time period.

PARTIES

The petitioner is Rodney A. Hurdsman, a Texas State prisoner currently serving a 75-year prison sentence for theft of property and is presently confined at the Robertson Unit in Abilene, Texas. The respondent is Bobby Lumpkin, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

RELATED CASES

- Hurdsman v. Lumpkin, No. 22-10280, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 15, 2023.
- Hurdsman v. Lumpkin, No. 4:21-cv-427, U.S. District Court for the Northern District of Texas. Judgment entered Feb. 18, 2022.
- Ex parte Hurdsman, No. WR-89,899-06, Texas Court of Criminal Appeals. Judgment entered Oct. 7, 2020.
- Hurdsman v. State, No. PD-30-19, Texas Court of Criminal Appeals. Judgment entered Mar. 20, 2019.
- Hurdsman v. State, No. 02-17-319-CR, Second Court of Appeals - Fort Worth. Judgment entered Nov. 8, 2018.
- State v. Hurdsman, No. CR-17817, 271st District Court, Wise County, Texas. Judgment entered Sept. 14, 2017.

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APPENDIX B: Opinion and Order of U.S. District Court Judge, Reed O'Connor, Northern District of Texas, in Hurdsman v. Lumpkin, Case No. 4:21-cv-427-O, judgment entered on Febuary 18, 2022. The opinion and order is cited at 2022 U.S. Dist. LEXIS 29425.

APPENDIX C: Order of Fifth Circuit U.S. Court of Appeals, Circuit Judge, James L. Dennis, granting COA in Hurdsman v. Lumpkin, Case No. 4:21-cv-427-O, entered on October 21, 2022.

APPENDIX D: Decision of Sudderth, Meier, and Gabriel, Justices, of the Second Court of Appeals of Texas, in Hurdsman v. State, Case No. 02-17-319-CR, judgment entered on November 8, 2018. The unpublished decision is cited at 2018 Tex. App. LEXIS 9193.

APPENDIX E: Order of Fifth Circuit U.S. Court of Appeals, Circuit Judge, James E. Graves, denying Petitioner's motion for leave to file petition for rehearing en banc out of time in Hurdsman v. Lumpkin, Case No. 22-10280, entered on August 7, 2023.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

DECISIONS BELOW

The decision of the Fifth Circuit U.S. Court of Appeals is not reported. It is cited however at 2023 U.S. App. LEXIS 14922, and a copy is attached as Appendix A to this petition. The order of the U.S. District Court for the Northern District of Texas is cited at 2022 U.S. Dist. LEXIS 29425, and a copy is attached as Appendix B to this petition. The order of Fifth Circuit U.S. Court of Appeals, Circuit Judge, James L. Dennis, granting a COA is attached as Appendix C to this petition. And the decision of the Second Court of Appeals of Texas was not reported. It is cited at 2018 Tex. App. LEXIS 9193, and a copy is attached as Appendix D to this petition.

JURISDICTION

The judgment of the Fifth Circuit U.S. Court of Appeals was entered on June 15, 2023. Orders denying petition for rehearing en banc and panel rehearing were entered on August 7, 2023 and August 22, 2023, as the Fifth Circuit does not give inmate petitioners the benefit of the prisoner mailbox rule on petitions for rehearing. Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invloves the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witnesses against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This case involves the Fourteenth Amendment to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case further involves Title 28 U.S.C. §2254 and the Antiterrorism and Effective Death Penalty Act of 1996.

STATEMENT OF THE CASE

On Febuary 24, 2014 various tools and equipment were reported stolen from a gas-compression station in Wise County, Texas. Among the items reported missing were five (5) exhaust catalysts alleged to range in value from $1,500 to more than $8,000 each. ROA.825-31. The Petitioner, Rodney Hurdsman ("Hurdsman"), was first taken into custody by Wise County authorities in connection with the stolen property on Febuary 25, 2014. ROA.856. On March 1, 2014 he posted bond and was released, however, he was again taken into custody on March 17, 2014 after additional charges were brought against him by Wise County authorities related to the case. ROA.477.

On April 24, 2014 Hurdsman retained an attorney named Jim Shaw to represent him and he was again released from custody after Mr. Shaw posted his bond on that same date. ROA.477-79. On June 6, 2014 Hurdsman was indicted in Wise County for theft of property $20,000-$100,000, a third degree felony with a punishment range of 2-10 years in prison. ROA.327. Around that time Mr. Shaw began to have mental and physical health problems and was then diagnost with a form of brain cancer which he unfortunately later succumbed to in 2016. See Hurdsman v. State, slip op. at 3-4 (referencing, Mitch Mitchell, Fort Worth lawyer Jim Shaw fought cancer as hard as he fought for his clients, Fort Worth Star-Telegram (Dec. 28, 2016, 9:48 PM), https://www.star-telegram.com/news/local/obituaries/article123467179. html (last visited Oct. 30, 2018)). ROA.135-36.

"ROA" refers to the Federal Record on Appeal followed by citation to page number. "RE" refers to numbered Record Excerpts submitted by Hurdsman on Federal Appeal.

Consequently, this resulted in a young associate of Mr. Shaw's named Ray Napolitan appearing on Mr. Shaw's behalf representing Hurdsman at early court appearances in the case. On August 13, 2014 after one of these court appearances Mr. Napolitan conferred with Greg Lowery, the Wise County D.A., and communicated to Hurdsman in the presence of his wife that he had negotiated a favorable plea-bargain with the State: an eighteen (18) month term of imprisonment in exchange for Hurdsman's quilty plea to state jail felony theft. ROA.3857-71;RE.12-14. At that time, Hurdsman communicated that he wished to accept the State's offer to Mr. Napolitan. Mr. Napolitan then communicated to Hurdsman that he would immediately inform Mr. Lowery of Hurdsman's decision to accept the State's offer and that he would have the case set for a plea hearing before the judge. Id. However, Mr. Napolitan failed to communicate Hurdsman's acceptance of the plea agreement back to the State (seemingly, because Greg Lowery has never answered or been made to answer the question of whether he even made the eighteen (18) month offer; let alone the question of whether or not Mr. Napolitan communicated Hurdsman's acceptance of the offer back to him and the State). Nevertheless, it is clear that Mr. Napolitan failed to have the case set for a plea hearing in a reasonable amount of time to memorialize the plea agreement Hurdsman had entered into with the State. Id.

In any event, on September 29, 2014 Hurdsman was arrested in Shreveport, Louisiana, and booked into the Caddo Parish Detention Center pursuant to an arrest warrant lodged against him by Wise County authorities again concerning this case. See Caddo Parish Sheriff's Office - Arrest Report (and Booking Sheet). ROA.3864.

See also, Valentina Hurdsman Affidavit, attached Exhibit-B. RE.12. At that time, Hurdsman did not have any other warrants or holds lodged against him with Caddo Parish authorities from any other state or federal jurisdiction; nor did he have any other charges pending against him in the State of Louisiana. Therefore, Hurdsman waived extradition to Wise County, Texas, however, for whatever reason Wise County authorities sat back and did nothing to return Hurdsman to their jurisdiction. See Document 00516307624, Page 13 Fn. 3, and 36 ¶ 1.

Nevertheless, on October 7, 2014 Mr. Napolitan filed a motion with the Court and was permitted to withdraw Mr. Shaw from further representing Hurdsman in the case without notice to Hurdsman or his presence in court. ROA.330-36;RE.17. Mr. Napolitan attached to the motion an Internet newspaper article that entirely misrepresented the facts surrounding Hurdsman's arrest in the State of Louisiana. Id. Additionally, Mr. Napolitan failed to take any steps to protect Hurdsman's interest in the eighteen (18) month plea agreement he had negotiated with the State, and which he had communicated and Hurdsman accepted. Mr. Napolitan further failed to even secure or request substitute counsel for Hurdsman when he withdrew Mr. Shaw to protect that interest and his interest in a speedy trial and disposition of the case. Id. Mr. Napolitan essentially abandoned Hurdsman just as plea negotiations were underway and pretrial investigations should have commenced. Hurdsman remained in jail and unrepresented by counsel in the case without him even knowing for almost three (3) years thereafter.

Notably, the trial Court had a duty to appoint Hurdsman counsel after he allowed Mr. Napolitan to withdraw Mr. Shaw from the case

because Hurdsman had been arrested in another jurisdiction pursuant to a Wise County arrest warrant and had previously been determined to be indigent by the Court and requested appointed counsel in the case. However, the Court neglected its responsibility to appoint substitute counsel for Hurdsman at that time. See, Tex. Code Crim. Proc. art. 1.051(c-1); and State Trial Court Record, Docket Sheet, July 3, 2014 docket entry.

After Wise County authorities failed to show up and transport Hurdsman back to their jurisdiction authorities from the State of Arkansas took custody of him on October 21, 2014 and transported him from Caddo Parish to the Saline County jail in Benton, Arkansas. Hurdsman remained in the Saline County jail for more than six (6) months based on alleged charges that post dated the Wise County charges, and were ultimately dismissed on April 22, 2015.

Hurdsman again waived extradition to Wise County, however, for whatever reason Wise County authorities decided not to extradite him back to their jurisdiction a second time. Instead, authorities from Williamson County, Texas, took custody of Hurdsman on April 27, 2015 and transported him to the Williamson County jail located in Georgetown, Texas, based on charges that again post dated the Wise County charges and that Hurdsman had not even been indicted on. On July 6, 2017 the Williamson County charges were also dismissed after Hurdsman spent over twenty six (26) months in that jail, which was no more than a three (3) hour drive from Wise County, Texas.

Indeed, forty (40) months after his initial arrest in the case, and thirty four (34) months after his arrest pursuant to a Wise County warrant in the State of Louisiana, Hurdsman was finally taken

to Wise County by Williamson County authorities on July 7, 2017. It was not until then that Hurdsman first learned that Mr. Shaw was no longer his attorney and that he had been entirely without counsel in the case since October 7, 2014. On July 12, 2017, the Court finally decided to appoint Hurdsman substitute counsel and an attorney named David Singleton begin representing Hurdsman in the case. ROA.337;RE.17.

After conducting his initial consultation with Hurdsman at the Wise County jail Mr. Singleton met with Wise County D.A., Gregory Lowery, specifically concerning the veracity of information he had obtained from Hurdsman about the State's eighteen (18) month plea bargain offer in 2014. During that meeting Mr. Lowery confirmed to Mr. Singleton that he had in fact made the offer to Hurdsman back in 2014 while negotiating a disposition in Hurdsman's case with Mr. Napolitan. However, Mr. Lowery informed Mr. Singleton that the State had withdrawn the eighteen (18) month plea bargain offer at some unspecified point in time, and that the State's offer was now forty (40) years. Mr. Lowery further informed Mr. Singleton that it still may turn out that Hurdsman would be allowed to accept the State's previous eighteen (18) offer depending on how things come together and the case progresses.

Mr. Singleton placed this information on the record during a September 11, 2017, pre-trial hearing, and represented before the Court that there had been an eighteen (18) month plea offer prior in the case and that Hurdsman had intended to accept it, however his prior attorney in the case didn't follow through and do it. ROA.1535. The Second Court of Appeals opinion in Hurdsman's case

specifically cites to Mr. Singleton's representation to the Court concerning the eighteen (18) month plea offer in the record, and provides further proof that the offer was made and had existed. See, Hurdsman v. State, slip op. at 11-12; ROA.143-44.

After Hurdsman declined the State's new forty (40) year offer, on August 15, 2017 the State filed notice of its intent to seek enhancement of the sentencing range from 2-10 years in prison to 25-life based on proof of prior felony convictions. ROA.249-51. On September 12, 2017 Hurdsman was taken to trial, and on September 14, 2017 a jury found him guilty of third degree felony theft and sentenced him to seventy five (75) years in prison after finding the prior enhancement charges true. ROA.490-509;RE.4-6.

Hurdsman subsequently filed a direct appeal with the Second Court of Appeals in which his counsel raised a single ground for review: that his right to a speedy trial had been violated. That Court denied his claim on that ground and affirmed his conviction on November 18, 2018. However, the Court's opinion reflects that the Court's decision was based on extremely flawed fact findings and applications of law. Entirely contrary to the Court's own recitation of facts Hurdsman was not in federal prison or even in federal custody at any time during the forty three (43) month delay before his trial. See, Hurdsman v. State, slip op. at 3 and 12; ROA.135,144. The Court further erred when it attributed the delay before trial to Hurdsman and faulted him for failing to raise his speedy trial request until he was brought back to Wise County in 2017. Id. at 10-12; ROA.142-44. Hurdsman was unrepresented by an attorney and not even aware of it during the relevant time period.

Nevertheless, on March 20, 2019 the Texas Court of Criminal Appeals (TCCA) refused Hurdsman's petition for discretionary review on the speedy trial violation ground. ROA.318.

On January 13, 2020 Hurdsman filed an application for writ of habeas corpus with the TCCA pursuant to article 11.07 of the Texas Code of Criminal Procedure. Hurdsman's state habeas writ presented allegations of ineffective assistance of counsel, the denial of counsel altogether, as well as a violation of his right to a speedy trial, and he promptly requested an evidentiary hearing to develop the record and resolve the fact issues raised by those allegations. ROA.3689-3812. Central to the ineffective assistance of counsel and denial of counsel altogether allegations was that Mr. Napolitan: failed to communicate back to the State Hurdsman's acceptance of the eighteen (18) month plea offer; he withdrew Mr. Shaw from the case under false pretenses and without notice to Hurdsman; and he failed to secure substitute counsel for Hurdsman and protect his interest in the eighteen (18) month plea offer he had accepted. Hurdsman was subsequently left completely without counsel in the case for thirty three (33) months after Mr. Napolitan withdrew Mr. Shaw from representing Hurdsman in the case. Id.

After Hurdsman's state habeas writ was filed with the trial court the Wise County D.A. never explicitly admitted or denied that they had extended the eighteen (18) month offer. Instead, they opted not to file an answer or respond to Hurdsman's state writ. Nor did the trial Court take any action regarding Hurdsman's state writ which resulted in it being overruled by operation of law and it was then forwarded to the TCCA. In an unpublished order

issued on April 1, 2020 the TCCA remanded the case back to the trial court with specific instructions to further develop the record on certain material fact issues because Hurdsman had alleged facts in his habeas application that, if true, could entitle him to relief on his claims and needed to be resolved. ROA.3967-69. The remand order required the trial court to order Mr. Napolitan to answer Hurdsman's ineffective assistance of counsel claim and the allegation he failed to communicate Hurdsman's acceptance of the State's eighteen (18) month plea offer back to the State in 2014. The order also required the trial court to make specific findings of fact and conclusions of law as to whether: The State made Hurdsman an eighteen (18) month plea bargain offer in the case; Napolitan communicated that Hurdsman had accepted an eighteen (18) month plea offer back to the State; and the trial court would have accepted the eighteen (18) month plea agreement at that time. The trial court was further required to make specific findings of fact and conclusions of law as to whether: From October 7, 2014 to July 12, 2017 Hurdsman was denied his right to counsel in the case. ROA.3967-69.

The trial court judge was not the same judge that presided over Hurdsman's case in 2014, or in 2017, and had no first hand knowledge of the previous proceedings or the individuals involved. Nevertheless the trial court decided not to conduct a live hearing when the case was remanded for further factual development. Instead, the trial court solicited an affidavit from Mr. Napolitan through an ex parte communication concerning the TCCA's remand order. As a result, Mr. Napolitan provided the court with an affidavit; however, he denied that: He had ever negotiated and secured an eighteen (18) month plea agreement with the State in 2014; the State had never made any plea

offer of eighteen (18) months or any other such offer to Hurdsman; and that he ever comminicated an eighteen (18) month or any other offer to Hurdsman from the State in the case in 2014. Mr. Napolitan further made several other untruthful assertions in his affidavit which were inequitably interjected into the record in Hurdsman's case and incorrectly cited as fact. ROA.3368-71;RE.15.

After Hurdsman was confronted with the prevaricative affidavit Mr. Napolitan's submitted to the trial court he provided the trial court with direct evidence he had recently obtained from attorneys from the U.S. Attorneys Office in Arkansas, via his federal defense attorney, that Mr. Napolitan had flat-out lied about the existance and his knowledge of an eighteen (18) month plea bargain the State offered Hurdsman. On July 16, 2020, via the Wise County court clerk, Hurdsman filed a computer thumb drive containing an audio recording of a June 3, 2015 jail call he had with Mr. Napolitan while he was confined at the Williamson County jail located in Georgetown, Texas. During that phone conversation Mr. Napolitan can be heard affirming details of the eighteen (18) month plea offer from the State out of his own mouth. ROA.3432-40.

Along with the thumb drive Hurdsman filed a written memorandum describing the substance of the audio evidence and an affidavit in which he swore to its authenticity. ROA.3303-11;RE.16. Hurdsman's affidavit was sufficient to authenticate the recording under the Texas Rules of Evidence. See Tex. R. Evid. 901(a)-(b)(5) (West 2017).

A photocopy of the thumb drive is found in the record, however, the actual thumb drive itself and the evidence of jail call that was on it is not. That critical evidence inexplicably was missing

from the record and was not forwarded by the clerk to the TCCA or the federal courts to be properly considered in the case as was required by state law. See Texas Criminal Code Article 11.07 §3(d).

Nevertheless, the trial court's findings of fact explicitly relied on Mr. Napolitan's affidavit denying the existence of any eighteen (18) month offer, without addressing the implications of the audio evidence and Mr. Singleton's representations on the record disproving Mr. Napolitan's assertions, to reject Hurdsman's claims. The trial court disregarded the TCCA's order to determine if the State had made the offer and Mr. Napolitan had communicated that Hurdsman had accepted the offer. The trial court's findings of fact recite Mr. Napolitan's affidavit almost verbatim and exclude every other individual involved from the fact finding process. ROA.3368-71;3372-75. The case was then sent back to the TCCA for disposition. On October 7, 2020 the TCCA denied Hurdsman's application for post conviction relief without written order on the findings of the trial court and independent review of the record.

Hurdsman filed through counsel a federal writ of habeas corpus pursuant to 28 U.S.C. §2254 asserting the same Constitutional claims he had brought in state court. The federal court defered to State's factual findings and conclusions of law and denied Hurdsman's case on Febuary 18, 2022. Hurdsman was granted a COA on his ineffective assistance of counsel, and denial of counsel altogether claims and sought review in the Fifth Circuit U.S. Court of Appeals. That court affirmed the district court's judgment on June 15, 2023, and denied Hurdsman's petition for rehearing on August 22, 2023.

REASONS FOR GRANTING THE WRIT

I. Conflict in State and Federal Courts on Whether Pursuant to Authoritive U.S. Supreme Court Decisions the Pretrial Period is a Critical Stage of the Criminal Proceedings for Sixth Amendment Right to Counsel Purposes.

A. Conflict in the Federal Appeal Courts.

The Fifth Circuit U.S. Court of Appeal's opinion in the case sub judice, and others, conflict with the Sixth Circuit's opinion in Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003), that the pretrial period is a critical stage for Sixth Amendment right to counsel purposes. In the case sub judice, and others, the Fifth Circuit has held that the pretrial period is not a critical stage of the overall trial proceedings, and denied petitioners relief even when they were incarcerated without counsel for periods of up to three (3) years. In Mitchell, however, the Sixth Circuit held that pursuant to U.S. Supreme Court precedent, "the pretrial period constitutes a critical stage because it encompasses counsel's constitutionally imposed duty to investigate the case," and without meaningful "pretrial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." Mitchell, 325 F.3d at 743; (citing Strickland v. Washington, 466 U.S. 688, 691 (1984)).

B. Federal Courts Have Issued COA Augmenting the Conflict.

Federal jurists from the First, Fourth and Fifth Circuit U.S. Courts of Appeal have concluded that reasonable jurists could disagree with a determination that the pretrial period is not a critical

stage of the overall criminal trial proceedings and/or; that jurist could conclude that the issue of whether the pretrial period is a critical stage of the overall trial proceedings was adequate to deserve encouragement to proceed for further review. Ultimately, the federal jurists concluded that the defendants in the cases had made a substantial showing of a denial of a constitutional right: The denial of the Sixth Amendment right to counsel at the critical pre-trial stage of the proceedings. See Fusi v. O'Brien, 621 F.3d 1 (1st Cir. 2009); Graves v. Padula, 394 Fed. Appx. 978 (4th Cir. 2010) and; Hurdsman v. Lumpkin, 2023 U.S. App. LEXIS 14922 (5th Cir. 2023)).

C. Conflict in State Appeal and Supreme Courts.

The Fifth Circuit U.S. Court of Appeal's opinion in the case sub judice, and others, further conflict with the Court of Appeals of Michigan's decision in People v. Dixon, 263 Mich. App. 393 (Mich. 2004); and the Supreme Court of Delaware's decision in Deputy v. State, 500 A.2d 581 (Del. 1985), that the pretrial period is a critical stage of the proceedings for Sixth Amendment right to counsel purposes. In Dixon, the Court of Appeals of Michigan held: "The pre-trial period constitutes a 'critical stage' because it encompasses counsel's constitutionally imposed duty to investigate the case." Dixon, 263 Mich. App. at 397. In Deputy, an older case, the Supreme Court of Delaware held: "The Supreme Court has stated that the presence of counsel at critical pretrial stages is often as important, if not more so, than the presence of counsel at trial." Deputy, 500 A.2d at 591 n.13; (citing Powell v. Alabama, 287 U.S. 45, 54 (1932); see also, Urguhart v. State, 203 A.3d 719 (Del. 2019).

D. Authoritive Landmark U.S. Supreme Court Decisions Establish the Pretrial Period is a Critical Stage of the Proceedings.

"The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process." Iowa v. Tovar, 541 U.S. 77, 87 (2004)(citations omitted); see Mempa v. Rhay, 389 U.S. 128, 134 (1967). "This principle derives from Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), which held that a trial court's failure to appoint counsel until the trial began violated the Due Process Clause of the Fourteenth Amendment" because the defendants "thus were deprived of the opportunity to consult with an attorney, and to have him investigate their case and prepare a defense for trial." United States v. Henry, 447 U.S. 263, 290-91 (1980)(parallel citations omitted).

The U.S. Supreme Court has not provided a comprehensive and final one-line definition of a "critical stage." Instead, the U.S. Supreme Court has provided five (5) descriptions. A critical stage in a case may occure, when: (1) "[a]vailable defenses may be irretrievably lost, if not then and there asserted," Hamilton v. Alabama, 368 U.S. 52, 53 (1961); (2) "where rights are preserved or lost," White v. Maryland, 373 U.S. 59, 60 (1963); (3) where counsel is "necessary to mount a meaningful defense," United States v. Wade, 388 U.S. 218, 225 (1967); (4) where "potential substantial prejudice to defendant's rights" is inherent in a particular proceeding and the presence of counsel will "help avoid that prejudice," Coleman v. Alabama, 399 U.S. 1, 9 (1970); or; which holds "significant consequences for the accused," Bell v. Cone, 535 U.S. 685, 696 (2002); See Van v. Jones, 475 F.3d 292, 312 (6th Cir. 2007)(listing same).

In Bell v. Cone, the U.S. Supreme Court identified "critical stages" by looking to previous cases in which it had so characterized various stages of criminal proceedings. By this reasoning, the pretrial period is indeed a critical stage for Sixth Amendment right to counsel puposes. Several U.S. Supreme Court cases demonstrate that the period between appointment of counsel and the start of the actual trial itself, is indeed, a "critical stage" for Sixth Amendment purposes. In the landmark U.S. Supreme Court decision Powell v. Alabama, 287 U.S. 45 (1932), which established the constitutional right to counsel, the Court described the pretrial period as "perhaps the most critical period of the proceedings...that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." Powell, 287 U.S. at 69.

Therefore, the pretrail period constitutes a "critical stage" because it encompasses counsel's constitutionally imposed duty to investigate the case. In another landmark U.S. Supreme Court decision Strickland v. Washington, 466 U.S. 668 (1984), the Court explicitly found that trial counsel has a "duty to investigate" and that to be able to discharge that duty, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unecessary." Strickland, 466 U.S. at691. Thus, without meaningful "pretrial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003)(citing Strickland, 466 U.S. at 691). It has been emphasized by the U.S. Supreme Court that the pretrial period is a critical stage for Sixth Amendment right to counsel purposes.

II. Conflict in State Court Decisions Whether Complete Denial of Counsel During Plea Negotiations Constitute a Per Se Sixth Amendment Violation.

A. Conflict With State Court Decisions.

The Fifth Circuit U.S. Court of Appeal's opinion in the case sub judice conflicts with the Supreme Court of Kentucky's opinion in Stone v. Commonwealth, 217 S.W.3d 233 (Ky. 2007), that plea-negotiations" and "guilty plea hearings" are "critical stages" of the criminal proceedings and "we are bound by U.S. Supreme Court's very clear dictates that the complete denial of counsel at a critical stage is reversible error per se, not subject to harmless error review." Stone, 217 S.W.3d at 240;(citations omitted); accord Tobin v. Commonwealth, 622 S.W.3d 663, 668 (Ky. App. 2021).

B. The Supreme Court of Kentucky has Decided an Important Question of Federal Law that Should be Settled by the U.S. Supreme Court.

This Honorable Court should grant the writ to resolve this disputed important question of federal law: Whether the complete denial of counsel after plea negotiations resulted in an offer from the State being accepted by the defendant, but then left unresolved when counsel withdraws without notice, and later rescinded by the State at some unknown time, is a per se structural error.

C. Plea Negotiations are a Critical Stage of the Proceedings.

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process. During plea negotiations defendants are 'entitled to the effective assistance of comp-

etent counsel.'" Lafler v. Cooper, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012)(citations omitted)(quoting McMann v. Richardson, 397 U.S. 759 (1970))(citing Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); Padilla v. Kentucky, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010); Hill v. Lockhart, 474 U.S. 52, 54 (1985).

In a series of decisions culminating in Padilla, Lafler and Frye, the U.S. Supreme Court has made clear that 'plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process[]...that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stage." Frye, 132 S. Ct. at 1407. Plea negotiations frequently determine "who goes to jail and for how lone," often making plea negotiations "the only stage when legal aid and advice would help criminal defendants." Frye, 566 U.S. 143-44; see also Lafler, 566 U.S. at 169-70 (observing "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."). According to U.S. Supreme Court decisions the acceptance of a plea offer and the entry of a guilty plea is a critical stage, creating an entitlement to counsel. Iowa v. Tovar, 541 U.S. 77, 81 (2004). In fact, acceptance of a plea bargain is a critical stage, according to the U.S. Supreme Court, because assistance of counsel is necessary "so that the accused may know precisely what he is doing, so that he is aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). Complete denial of counsel during critical plea negotiations is a per se structural error.

D. The Sixth Amendment Right to Counsel at Critical Stages.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right means more than a lawyer at trial. See Powell v. Alabama, 287 U.S. 45, 60-66 (1932). It ensures that defendants facing incarceration will have counsel at "all critical stages of the criminal process." Marshall v. Rodgers, 569 U.S. 58, 62 (2013)(citations omitted); see also, e.g., Lee v. United States, 137 S. Ct. 1958, 1964, 198 L. Ed. 2d (2017).

The case sub judice, is not about the effectiveness of counsel, which would require him to show prejudice. See Strickland, 466 U.S. 668 (1984). He argued, instead, that his attorney withdrew from the case without notice, after plea negotiations had commenced and were ongoing, and leaving a plea offer from the State unresolved that he had accepted when offered. Granted he was arrested in another state, however, he was arrested based on a warrant in this case, and was out on bond, was unaware of the warrant and had not absconded. He spent almost three (3) full years incarcerated and without counsel in the case after his attorney withdrew and, at some unspecified point the State's plea offer was rescinded. Wise County authorities made no attempt to return him to their jurisdiction, and nobody had informed him he was without counsel. During that time, the trial court never appointed substitute counsel, although he had file an application for court appointed counsel and indigency declaration in 2014, shortly after being indicted. Thus, he was completely without counsel at a critical stage of the proceedings, such that prejudice is presumed, without any showing of prejudice or harm review.

E. Violation of the Sixth Amendment Right to Counsel at a Critical Stage and Per Se Presumptive Prejudice Review.

This type of claim finds its roots in United States v. Cronic, 466 U.S. 648 (1984). In Cronic, decided the same day as Strickland, the U.S. Supreme Court synthesized its right-to-counsel jurisprudence to date and, in doing so, described the "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658; see also, e.g., Bell v. Cone, 535 U.S. 685, 695-96 (2002)(describing Cronic's "three situations"). In the case sub judice, the petitioner invoked Cronic's first and "[m]ost obvious" circumstance- "the complete denial of counsel." Cronic, 466 U.S. at 659. Such a denial need not last the entire proceeding, but it must occur during a critical stage. Id. Cronic explained that the Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage." Id. at 659 n.25. That explanation referred to cases in which counsel had not been appointed to represent the accused at the time of a critical stage in the proceedings.

Nevertheless, Cronic and later decisions emphasized that the denial must be "complete" to warrant the presumption of prejudice. Cronic, 466 U.S. at 659; Wright v. Van Patten, 552 U.S. 120, 125 (2008); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000); see also Penson v. Ohio, 488 U.S. 75, 88 (1988). The denial of counsel at a critical stage is not subject to harmless error analysis once a lawyer-less stage has been deemed as critical. It is well established, that a complete absence of counsel at a critical stage of a criminal proceeding is

a per se Sixth Amendment violation warranting automatic reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error. Van v. Jones, 475 F.3d 292, 311-12 (6th Cir. 2007) (citing Cronic, 466 U.S. 649, 659); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1907-08 (2017) (citing Gideon v. Wainwright, 372 U.S. 355, 343-45 (1963), holding that the Sixth Amendment right to counsel is so fundamental and essential to a fair trial that the Due Process Clause of the Fourteenth Amendment requires states to appoint counsel for indigent defendants)). As Justice Cunningham of the Supreme Court of Kentucky so succinctly put it, "for better or worse, we are bound by the U.S. Supreme Court's very clear dictates that the complete denial of counsel at a critical stage is reversible error per se, not subject to harmless error review." Stone v. Commonwealth, 217 S.W. 233, 240 (2007).

Indeed, in this day and age it is rare for any criminal prosecution not to involve some sort of plea negotiations along the way. Arguably, when this happens, and the defendant- through intermediary counsel -has been offered and accepted a plea-bargain from the State, it can unquestionably be the most critical stage of the criminal proceedings. This holds true in the state of Texas because a defendant soley relies on effective assistance of counsel during the plea-bargaining process. Plea-bargain offers do not have to be consigned in writing, and cannot be strickly enforced until after the judge has accepted the terms in open court. This has left many to believe comprehensive changes need to made because the current system is inherently susceptible to being manipulated, abused and inequitably corrupt. Ultimately, plea-offers are a critical stage.

F. Granting Retained Counsel's Motion to Withdraw Without Notice and Defendant's Presence in Court Constitutes a Per Se Violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

1. Substantive and Procedural Due Process Right to Notice and Opportunity to be Present at Motion to Withdraw hearing.

In Kentucky v. Stincer, the U.S. Supreme Court reiterated that "[t]he Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" 482 U.S. 730, 745 (1987)(citing Snyder v. Massachusetts, 291 U.S. 97, 105-106 (1934)). Although the Court emphasized that this privilege is not guaranteed "when [a defendant's] presence would be useless, or the benefit but a shadow," id., 106-107, due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence." Id. at 108. Therefore, a defendant is guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments the right to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure.

2. Defendant's Presence at the Hearing Would Have Contributed to His Opportunity to Defend Himself Against the Charges.

In the case sub judice, the defendant's retained counsel withthdrew without notice or the defendant's presence in court after a an eighteen (18) month plea-bargain had been offered and accepted by

the defendant..Upon withdrawing from the case, counsel failed to secure substitute counsel for the defendant, and further take steps to protect the defendant's interests in the plea-bargain and trial rights. The defendant was incarcerated and left without counsel in the case for almost three (3) full years after being arrested pursuant to warrant based on the charge. Counsel essentially abandoned the defendant shortly after he had been indicted at a critical stage of the proceedings when vital investigation, defense strategy, and trial preparation should have been taking place. At a crucial time, when essential trial right, witnesses and evidence should have been secured. Nevertheless, counsel was allowed to withdraw by the court.

As a result; critical evidence and witnesses were lost; speedy trial and other fundamental rights were lost; the eighteen (18) month plea-bargain offer was lost; and the defendant's choice in counsel was lost, as was his money to hire counsel. Ultimately, the defendant was appointed counsel and rushed to trial in a matter of a few weeks after finally being returned to Wise County, and he ended-up being convicted and sentenced to seventy (75) years after his counsel's last minute motions for continuance and to have him mentally evaluated were denied by the court. Indeed, the defendant's presence at his retained counsel's motion to withdraw hearing would have ensured him fundamental fairness in the proceedings because counsel's motion was spurious and unethical. Further, the defendant would have had "a reasonably substantial... opportunity to defend against the charge" because he would have been afforded his right to counsel of choice or counsel appointed by the court instead of being inequitably denied counsel for almost three (3) full years.

3. Conflicting Federal and State Trial and Appeal Court Decisions.

In a number of cases, courts have excluded defendants from discussions with the judge concerning the defendant's own representation in the case. See Gutierrez v. Alameida, 120 Fed. Appx. 81, 82 (9th Cir. 2005); United States v. Oles, 994 F.2d 1525 (10th Cir. 1993); Jackson v. State, 555 S.E. 2d 835 (Ga. Ct. App. 2001); People v. White, 870 P.2d 424 (Colo. 1994); Ferrell v. State, 401 S.E. 2d 741 (Ga. 1991). Even in circumstances in which there is a clear conflict of interest because the attorney alleged the defendant had attempted to burglarize his office; or the District Attorney's Office had filed charges against the attorney; or discussions included substantive matters concerning charges against the defendant. See Hale v. Gibson, 227 F.3d 1298 (10th Cir. 2000); Campbell v. Rice, 408 F.3d 166 (2005); United States v. Jones, 381 F.3d 114 (2d Cir. 2004). In each of these cases, the trial court deprived the defendant of his right to be present and to his voice in a critical decision concerning counsel.

In several other cases, courts have recognized the importance of the defendant's presence at this critical stage and reached a more appropriate result. See Bradley v. Henry, 413 F.3d 961 (9th Cir. 2005); State v. Lopez, 859 A.2d 898 (Conn. 2004); Hughes v. State, 421 A.2d 69 (Md. Ct. App. 1980); State v. Dunn, 74 P.3d 231 (Ariz. 2003); People v. Cardenas, 411 P.3d 956 (Colo. App. 2015).

4. Counsel's Motion to Withdraw Hearing Was a Critical Stage.

In Kentucky v. Stincer, the U.S. Supreme Court stated that "the fact that a stage in a proceeding is critical to the outcome of a trial may be relevant to due process concerns. Even in that context,

however, the question is not simply whether, 'but for' the outcome of the proceeding, the defendant would have avoided conviction, but whether the defendant's presence at the proceeding would have contributed to the defendant's opportunity to defend himself against the charge." Stincer, 482 U.S. at 745 n.17. The Court's reasoning in Kentucky v. Stincer parallels its decision in Snyder v. Massachusetts that the defendant has a right to be present where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder, 291 U.S. at 105-06.

The Court has long held, that personal interaction and confrontation are essential to the fairness of criminal proceedings. In the 1892 case Lewis v. United States, the Court stated that a major principle in the area of criminal law and procedure ia that after the indictment, no proceeding shall take place in the defendant's absence. 146 U.S. 370, 372 (1892). The Court claimed that a defendant's right to be present during all stages of the prosecution is a "high constitutional right." Id. at 375. The defendant had a right to notice and to be present at the hearing on his retained counsel's motion to withdraw in the case sub judice. It was a critical stage of the proceedings in which he was denied a fair and just opportunity to defend against the charge because it left him without an attorney in the case altogether for almost three (3) full years.

5. Denied Counsel of Choice or to Have Counsel Appointed.

"The right to select counsel of one's choice... [is a] constitutional guarantee [of the Sixth Amendment]." United States v. Gonzales Lopez, 548 U.S. 140 (2006). "In our adversary system of criminal

justice , any person haled into court, who is to poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 355, 344 (1963). In the case sub judice, the defendant was denied both his right to counsel of choice and to have counsel appointed by the court all in one swoop.

III. An Accused's Failure to Assert Their Right to a Speedy Trial and the Delay Before trial Should Not Be Attributed to the Defendant When They Are Incarcerated and Without an Attorney.

A. Supervisory Power of this Court is Required.

The supervisory power of this Court are required because the federal district court entirely departed from this Court's decisions and the Antiterroism and Effective Death Penaly Act of 1996 (AEDPA). The district court relied on and cited Texas state court decisions to deny the defendant relief on his petition for writ of habeas corpus 28 U.S.C. §2254. Specifically, the district court ignored this Court's decisions in Barker v. Wingo, 407 U.S. 514 (1972), Doggett v. United States, 505 U.S. 647 (1992), and Vermont v. Brillon, 566 U.S. 81 (2009), and the limited review of §2254 to U.S. Supreme Court cases.

B. Contrary to and an Unreasonable Application of U.S. Supreme Court Decisions in Barker, Doggett and Brillon.

The district court adopted the state court's decision which: (1) Put the burdon on the defendant for not bringing himself to trial; (2) attributed the delay before trial, and failure to assert right to a speedy trial, against the defendant when he was incarcerated and without counsel. This conflicts and contrvenes this Court's opinions that these factors cannot be attributed to a defendant in this case.

C. District Court Relied on and Cited State Court Cases on §2254 Federal Habeas Corpus Review Outside the Limited Scope of Review Mandated By the AEDPA and U.S. Supreme Court Decisions.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1214, on April 24, 1996. Title I of the Act applies to all federal petitions for habeas corpus filed on or after its effective date. Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). By its terms, AEDPA applies to federal review of state court decisions, not to the specific explanations that support them. 28 U.S.C. §2254(d). This distinction might seem technical, but the U.S. Supreme Court's decision in Harrington v. Richter rendered it critical. 562 U.S. 86 (2011).

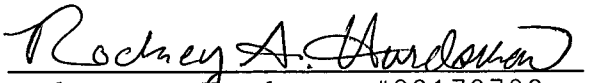
Federal habeas relief may not be granted for claims subject to §2254(d), unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of the U.S. Supreme Court, §2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or that it "involved an unreasonable application of" such law, §2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, §2254(d)(2).

In the case sub judice, the U.S. District Court relied on and cited the same state case law as the Second Court of Appeals of Texas did to deny the petioner's federal claims. Although the cases analyzed the speedy trial principles in Barker v. Wingo, 407 U.S. 514 (1972), they were contrary to and an unreasonable application of U.S. Supreme Court decisions in Barker, Doggett v. United States, 505 U.S. 647 (1992), and Vermont v. Brillon, 556 U.S. 81 (2009).

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,



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